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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 605.

JACOB SIEGEL COMPANY,

Petitioner,

v.

FEDERAL TRADE COMMISSION.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE THIRD
CIRCUIT, NO. 8407.

BRIEF FOR PETITIONER.

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To THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE
JUSTICES OF THE SUPREME COURT OF THE UNITED
STATES:

Opinion Below.

The opinion of the Circuit Court of Appeals is
reported at 150 Fed. (2d) 751 and is printed in the Record
at p. 891.

Basis of Jurisdiction.

Jurisdiction is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938. The opinion of the Circuit Court of Appeals for the Third Circuit was filed November 30, 1944. A Petition for Rehearing was granted March 6, 1945, and the court's original opinion confirmed in a final opinion filed September 20, 1945. An enforcement order was entered October 9, 1945, and the enforcement thereof stayed to afford time for presentation of the issue to this Court. Certiorari was granted January 2, 1946.

Questions Presented.

(1) Whether a Circuit Court of Appeals may modify an order of the Federal Trade Commission which it believes harsh and unreasonable, as was held proper in the case of **Federal Trade Commission v. Royal Milling Co.**, 288 U. S. 212 (1933), and **Federal Trade Commission v. Hires Turner Glass Co.**, 81 Fed. (2d) 362 (1936) (C. C. A. 3).

(2) Whether this Court has the power, asserted in the **Royal Milling case**, to modify an order of the Federal Trade Commission which it may believe harsh and unreasonable.

Statement of the Case.

This is a petition to review a cease and desist order issued by the Federal Trade Commission directing the Petitioner to stop using the word "Alpacuna" on over-coats on the ground that the word is a misleading representation that the coats contain the hair of an animal called the "Vicuna" found only in the region of the Andes Mountains of South America. The coats do contain Alpaca fibre to the extent of about fifty per cent, and the name is a fanciful one invented by the Petitioner years ago by combining the words "Alpaca" and "uma", signifying exclusiveness.

The original complaint was filed on May 6, 1938. It charged the Petitioner with issuing samples, books and advertising copy, representing that the garments were made of all wool and hair fabric. There was no complaint about the use of the name "Alpacuna."

A settlement of the controversy was tentatively agreed upon between counsel for the parties, but was finally ignored by the Commission. Its counsel was changed for some reason unknown to the Petitioner and an amended complaint issued. This complaint contained additional allegations, including a complaint that the use of the term "Alpacuna" constitutes (R. 6a) "a representation by said respondent (Petitioner here) * * * that said fabric is composed entirely of the fur, wool or hair of the Alpaca and the Vicuna," and that it gave unscrupulous retailers means of increasing their sales "by representing that said overcoats and topcoats are all wool and composed solely of the fur, wool and hair of the Alpaca and Vicuna." A further complaint was made as to certain advertising copy which was claimed to represent that "Alpacuna" fabrics contain "the foreign fur, hair or wool of the Angora goat from the plains of Turkestan."

The Petitioner again filed an answer denying the additional complaints and averring that the name "Alpacuna" was a coined trade name and did not constitute a representation that the "Alpacuna" fabrics were composed of alpaca and vicuna and that, accordingly, it did not place in the hands of unscrupulous retailers a means of misrepresenting the coats.

The case then proceeded to hearing and after counsel for the Commission had conducted a long series of hearings in Philadelphia, New York, Baltimore and Washington he filed a further amended complaint. In this third complaint charges with respect to the term "Alpacuna" were modified and it was charged that the term represented to the public that the fabric is (R. 280a) "com-

posed entirely, or at least of a substantial quantity of the fur, wool or hair of the alpaca and vicuna." A further charge was made (R. 281a) that the slogan "There Is Only One Alpacuna Coat" was misleading when applied to both Petitioner's tope coats and overcoats, which were not of identical fibre content because of the cotton back on the heavy coat. Answer was again filed by Petitioner substantially denying the additional charges made. Petitioner was then permitted to put in its case. Testimony was taken before the Trial Examiner who filed his report without making any recommendation. Exceptions were taken and argued before the Commission with the result that a majority of the Commission endorsed an opinion directing the cease and desist order complained of. Commissioner Freer dissented (R. 655a).

The basic facts are that the Petitioner makes two overcoats, one a heavy coat, and the other a tope coat. They differ in character only that the heavy winter coat has a cotton back. On the tope coat, the cotton back is omitted. The face fabric was composed of 50% alpaca and 10% mohair and 40% wool. The face yarns comprised about 70% of the total fabric and the cotton back 30%.

The alpaca used in the fabric is known in the trade as Araqueppa alpaca. It is the only alpaca which can be obtained commercially and contains between 10% and 15% guanaco (hair from another small animal) (R. 539a, 540a, 541a; Petitioner's Ex. A with Answer, 17a). The mohair used in the fabric is obtained from Texas. The Angora goats of Texas produce as fine a mohair as the goats from Asia Minor (551a, 552a).

The fabric was designed for overcoats and when Petitioner placed the overcoats on the market it introduced them and sold them under the Company's trade name "Alpacuna," which was duly registered in the Patent Office as a trade-mark for "Men's tope coats, overcoats and suits in Class 39, clothing."

After the Commission issued its cease and desist order directing the Petitioner to stop using the trade name "Alpacuna", a petition for review was taken to the Circuit Court of Appeals. At the argument before the Circuit Court of Appeals, it developed that the Commission meant exactly what its order said. It proposed to stop completely the use of the trade name "Alpacuna" and it would not permit any modification of the word such as the addition of the words "contains no vicuna."

The Circuit Court of Appeals affirmed with considerable reluctance, as evidenced by the following excerpt from its opinion:

"Although we sustain the Commission on its finding as to the name because of substantial evidence supporting that finding, we think strongly that the order is far too harsh. It destroys a widely and favorably known trade name, in existence for fourteen years. It causes serious injury to the petitioner and its retail outlets. The infraction, as the case now stands, is slight and could be cured by simple qualifying language. We could dispose of the problem by modifying the Commission's order as suggested, if the practice as outlined in *Federal Trade Commission v. Royal Milling Co.*, 288 U. S. 212 and *Federal Trade Commission v. Hires Turner Glass Co.*, *supra*, a Third Circuit case, was still the law" (R. 808). (Emphasis supplied.)

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Thereupon the Petitioner changed its labels to conform with the copies attached later on in this brief. The labels now used show in conspicuous type beneath the word "Alpacuna" the words "contains no vicuna." A petition for rehearing was filed with the Circuit Court of Appeals. In granting this petition, the court entered the following order:

"After due consideration, the Petition for Rehearing in the above entitled case is hereby granted, said rehearing to be restricted to possible modification of the Federal Trade Commission's order" (R. 915).

904

Thereafter, the Circuit Court of Appeals on September 20, 1945, filed its opinion upon rehearing, as follows:

"After carefully considering the question of possible modification of the Federal Trade Commission's order, we feel compelled to adhere to our original decision which we confirm" (R. 916).

905

At the argument on rehearing, Petitioner presented to the Circuit Court of Appeals the modified labels referred to and asked that the enforcement order be modified to permit the use of this modified label. The court would have been entirely willing to permit this modification, but counsel for the Commission refused to agree.

The enforcement order was entered without modification, and Petitioner filed a petition for certiorari which was granted by this Court January 2, 1946.

Specifications of Errors Urged.

The Petitioner urges the following errors:

1. The court below erred in holding that it does not have the power to modify a remedy prescribed in a Federal Trade Commission cease and desist order which it believes to be unnecessarily harsh and destructive.
2. The court below erred in failing to hold the order of the Commission unconstitutional and void insofar as it unreasonably and unnecessarily destroys a valuable trade name.

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Summary of Argument.

The name "Alpacuna" has never deceived anybody. There is no finding that it has. The Commission has found it may in the future be deceptive because some experts brought in by it as witnesses stated they would interpret the name to mean the garment contained some vicuna fibre notwithstanding they knew it did not. Based on its finding of possible deception, resting on this evidence, the Commission ordered the destruction of this trade name and refuses to permit any neutralizing language such as "contains no vicuna." The Circuit Court of Appeals has concluded that it is without power to modify the remedy prescribed by the Commission.

The latest Federal Trade Commission case is

Federal Trade Commission v. Royal Milling Company, 288 U. S. 212 (1933).

This case has never been expressly overruled, but the Court of Appeals regards it as having been overruled by implication by the case of

Medo Photo Supply Corporation v. National Labor Relations Board, 321 U. S. 678 (1944).

Petitioner does not believe the Federal Trade Commission has unlimited power to impose an unreasonable remedy, and asks this Court to permit the Circuit Court of Appeals to modify the cease and desist order as it has announced it would do if it had the power or else to enter an order of modification in these proceedings.

This Court has recently directed modification of an order of the Labor Board in the case of

May Department Stores v. National Labor Relations Board. Decided December 10, 1945.

That case is regarded as negating the rule relied upon below that a court has no power to modify a remedy imposed by an administrative agency.

Argument.

The cease and desist order directs the Petitioner not to use the name "Alpacuna" notwithstanding it has used that name for fourteen years without evidence of deception to any customer. In its Opinion, the Circuit Court of Appeals states (R. 898):

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"Although we sustain the Commission on its findings as to the name because of substantial evidence supporting that finding, we think strongly that the order is far too harsh. It destroys a widely and favorably known trade name, in existence for fourteen years. It causes serious injury to the petitioner and its retail outlets. The infraction, as the case now stands, is slight and could be cured by simple qualifying language. We could dispose of the problem by modifying the Commission's order as suggested if the practice as outlined in **Federal Trade Commission v. Royal Milling Co., 288 U. S. 212** and **Federal Trade Commission v. Hires Turner Glass Co., supra**, a Third Circuit Case, was still the law." (Emphasis supplied)

The court then proceeds to state that it would dispose of the problem by modifying the Commission's order as suggested were it not for the fact that the court feels it has no power to do so. Therefore, the court concludes its opinion by affirming the order of the Federal Trade Commission, with which it thus disagrees.

Petitioner believes the court has the power to modify the order of the Commission along the lines indicated on either of two theories--First, the order is exceedingly harsh, and is, therefore, an abuse of discretion; and Secondly, there is no substantial evidence that the proposed qualifying words "contains no vicuna" would be ineffective. Therefore, the order is to that extent not

supported by evidence. The latest case in this Court on the subject dealing with the Federal Trade Commission is

Federal Trade Commission v. Royal Milling Company, 288 U. S. 212 (1933).

In this case, the Commission entered a cease and desist order, and this Court stated (p. 217):

"Although we sustain the commission in its findings and conclusions . . . we think under the circumstances the commission went too far in ordering what amounts to a suppression of the trade names."

This Court thereupon reversed the Circuit Court of Appeals, and sent the case back for the entry of a modified order less drastic than the destruction of the trade name involved in that case. Explanatory words were added to a name containing the words "Milling Company" to show the Company did not manufacture. This is the last case in this Court having to do with the subject-matter of trade names before the Federal Trade Commission.

The Circuit Court of Appeals was aware of the Royal Milling Company case, but considered it overruled by later cases in this Court dealing with the review of orders of the National Labor Relations Board, particularly the Medo case referred to below.

Petitioner does not believe the Court intended to announce so sweeping a result in the Medo case.

Medo Photo-Supply Corp. v. National Labor Relations Board, 321 U. S. 678 (1944).

In that case the Medo Corporation recognized a labor union as bargaining representative for its employees. Later the employees stated to the employer that they were

dissatisfied with the union and would abandon it if they were given a wage increase by independent negotiation. The increase was granted and the employees notified the union not to represent it.

Following an investigation by the Board, a cease and desist order was entered based on findings that the employer had violated Section 8 (1) and (5) of the Act, by interfering with the exercise of the right of the employees to bargain collectively. The Circuit Court of Appeals for the Second Circuit sustained the order, and on Certiorari, this Court affirmed. Chief Justice Stone in a footnote beginning on page 681 states as follows:

"It has now long been settled that findings of the Board, as with those of other administrative agencies, are conclusive upon reviewing courts when supported by evidence, that the weighing of conflicting evidence is for the Board and not for the courts, that the inferences from the evidence are to be drawn by the Board and not by the courts, save only as questions of law are raised and that upon such questions of law, the experienced judgment of the Board is entitled to great weight."

Following the Medo case came the case of *Herzfeld v. Federal Trade Commission*, 140 Fed. (2d) 207 (1944) in the Circuit Court of Appeals for the Second Circuit. In that case, Judge Learned Hand, at page 208, states as follows:

"• • • It does not follow that the relief granted should extend to an entire suppression of the word, 'Mills'; and, if we thought ourselves free to control the remedy, we might be satisfied to modify the order by merely adding some such suffix as the Supreme Court thought adequate in *Federal Trade Commission v. Royal Milling Co.*"

and at page 209:

"However, since Federal Trade Commission v. Royal Milling Co., *supra*, 288 U. S., 212, 53 S. Ct. 335, 77 L. Ed. 706, was decided, the Supreme Court has as much circumscribed our powers to review the decisions of administrative tribunals in point of remedy, as they have always been circumscribed in the review of facts."

The Circuit Court of Appeals for the Third Circuit in this case adopts the above quotation (R. 899-901). It continues at (R. 904):

⁸⁹²
"It is evident, therefore, that the discretion as to the remedy in such controversy as this has now been vested in the Federal Trade Commission. That discretion has been exercised to totally prohibit the use of the name 'Alpacuna' to the petitioner. Since the Commission has such power, we are unable, in view of the evidence, to say that the power has been abused in this instance, though under the same facts and circumstances, if we were still in control of the remedy, we would modify the order as above indicated."

After Reargument, the Court states (R. 905):

"After carefully considering the question of possible modification of the Federal Trade Commission's order, we feel compelled to adhere to our original decision, which we confirm."

The Circuit Court of Appeals for the Third Circuit thus feels that it is without power to modify a remedy which it believes "far too harsh." The only authority back of this position is found in the footnote on page 681 of the Opinion in the Medo case by this Court. That footnote was in a labor-board case and referred to findings only, and not to remedy.

This Court has nowhere announced that the decision

of an administrative agency, even the National Labor Relations Board, is final as to the remedy prescribed. In labor board cases, there has been a reluctance to modify the remedy. This is understandable in view of the great changes taking place in the labor field. There is, however, no such great change taking place in the use of trade names. Even in review of the labor board decisions, this Court has modified the remedy prescribed. Some of these decisions are cited in the Brief for the *Amicus Curiae* in support of the Petition for Writ of Certiorari.

Most recently in the case of

May Department Stores Company v. National Labor Relations Board, U. S. Sup. Ct., Decided December 10, 1945.

this Court was apparently unanimous in its feeling that a remedy prescribed by the National Labor Relations Board should be modified, and it was modified. The Court was in disagreement as to what the modification should be, but it seems to have been agreed by all members of the Court that there should be some modification.

In that case it appeared that May Department Store had approximately five thousand employees. In one department, there were about thirty employees who had been effectively organized by a C. I. O. Union. The rest of the store had not been organized. The National Labor Relations Board ordered an election in the department of thirty employees, and the C. I. O. Union was chosen. The employer could not appeal from this action, but it declined to deal with the Union. Shortly afterwards the Company granted an increase to all employees, including the unionized department, and made application to the War Labor Board for approval, stating in its application that if the Union objected, the application should be amended to exclude the thirty employees.

The Union made application for an injunctive order. The Board found that there were two unfair labor practices, (1), refusal to bargain with the Union; and (2) the

store-wide salary increase. A cease and desist order was entered in general terms: (1) enjoining the Company from refusing to bargain collectively; and (2) from in any manner interfering with the employees in the exercise of their right to join the Union. This enforcement order was affirmed by the Circuit Court of Appeals for the Eighth Circuit, and Certiorari granted.

It appeared as a fact that the grant of the wage increase was not for the purpose of injuring the Union or the small number of persons who belonged to it, but the refusal to bargain with the Union was considered a mistake of the Company, for the consequences of which it must suffer.

In an Opinion by Mr. Justice Reed, it was decided that the restraining order should be limited to the acts which the Company had performed—that a general restraining order was not necessary in this case. The Court makes the following statement:

"The test of the proper scope of a cease and desist order is whether the Board might have reasonably concluded from the evidence that such an order was necessary to prevent the employer before it 'from engaging in any unfair labor practice affecting commerce.' Section 10 (a). Equity has long been accustomed in other fields to reach conclusions as to the scope of orders which are necessary to prevent interferences with the rights of those who seek the courts' protection. Injunctions in broad terms are granted even in acts of the widest content, when the court deems them essential to accomplish the purposes of the act. We think that the Board has the same power to determine the needed scope of cease and desist orders under the National Labor Relations Act that courts have, when authorized to issue injunctions, in other litigation.

"That power of the Board is subject to review under Section 10. While the Board has been delegated initially the exclusive authority to prevent unfair

labor practices, courts, which are called upon to enforce such orders by their own decrees, may examine its scope to see whether on the evidence they go so beyond the authority of the Board as to require modification as a matter of law before enforcement. Section 10 (a) and (e). The Express Publishing Company case declared:

"To justify an order restraining other violations it must appear that they bear some resemblance to that which the employer has committed or that danger of their commission in the future is to be anticipated from the course of his conduct in the past." P. 437.

"We think that, in the circumstances of this proceeding, although there is a violation of Section 8 (1) as well as 8 (5), the violation of 8 (1) is so intertwined with the refusal to bargain with a unit asserted to be certified improperly that without a clear determination by the Board of an attitude of opposition to the purposes of the Act to protect the rights of employees generally, the decree need not enjoin Company actions which are not determined by the Board to be so motivated." (Emphasis added.)

Mr. Justice Rutledge wrote a separate Opinion "concurring in part", in which the Chief Justice and Mr. Justice Frankfurter joined. This Opinion states:

"I think only one unfair labor practice was shown, namely, refusal to bargain; and for that reason I think the Board's order must be modified to eliminate the restraints based on its finding of violation of §8 (1) as the Express Publishing Company case, 312 U. S. 426, requires in such a situation."

He also states:

"It is important for the administration of the Act to know whether the Board is to be free to adapt the remedy to fit the evil it has found to exist, as the

statute commands, §10 (e); or, on the contrary, its remedy thus adapted may be stricken down or modified although the finding which justifies it is approved. That in my judgment goes beyond correction of abuse of the Board's discretion and substitutes the Court's judgment for the Board's in devising the appropriate remedy.

"For this reason it becomes important to state the different reasons why I think the order should be modified to eliminate any restraint based upon the finding of violation of §8 (1)."

It is thus clear from both opinions that all the members of the Court involved felt there should be some modification with respect to the remedy. The order of the Board, in other words, went too far, and this Court refused to condone a sweeping injunctive decree in a case where the employer had performed a single act designed only fairly to raise a question which it desired to litigate. The employer had not unnecessarily gone out of its way to injure the Union. On the merits the employer lost its case, but this Court felt a punitive order going beyond the scope of the offense committed was uncalled for.

There are many cases where the rulings of other administrative bodies have been modified with respect to the remedy. This has been particularly true in the case of the Interstate Commerce Commission.

**American Trucking Associations, Inc. et al. v.
United States, 65 Sup. Ct. 1499 (1945); 18 L.
Ed. 1463.**

This case involved the granting of a certificate of public convenience and necessity to a railroad-owned motor carrier for services auxiliary to the railroad's service. The Commission granted the certificate. The special District Court refused to set aside the order. On appeal, this decision was reversed. At page 1468 of the Lawyers Edition, Mr. Justice Reed states:

"It is not enough that the railroad's motor operations are found by the Commission to be of a different character from over-the-road motor operations because they are integrated with railroad operation. The Commission must also consider the disadvantage to the public of a serious impairment of the non-rail motor carriers. Those affected are entitled to fully develop the bearing of the proposals on the transportation agencies which are involved. The discretion of the Commission should be exercised after consideration of all relevant information."

This decision reversed the action of the Commission in deciding what standard should be applied in granting or refusing a certificate.

Barrett Line, Inc. v. United States, 65 Sup. Ct. 1504 (1945); 18 L. Ed. 1405.

In this case the Interstate Commerce Commission denied a permit to act as a contract water carrier, and the three judge District Court dismissed the Complaint which sought review of that order. On appeal, this decision was affirmed as to operations other than chartering, and as to them, it was reversed and remanded for further proceedings. Four justices dissented. Nevertheless, the effect of the decision was in disagreement with the decision of the Commission.

In the recent case of

The John Kelley Company v. Commissioner of Internal Revenue, Decided January 7, 1946,

this Court reviews the subject of finality of decisions of the Tax Court. The Opinion goes to some length in tracing the history of the Tax Court, and refers to the Congressional Record to show an intention that decisions of the Tax Court should be largely final. The quotation from the Congressional Record refers to a right of appeal: "as, for instance, in the case of orders of the Federal

Trade Commission, and orders of the Secretary of Agriculture under the packers and stockyards act."

Following this quotation, this Court states in foot-note 7:

"Since the Federal Trade Commission and the Packers and Stockyards Acts differ as to the finality upon review of the determinations of the respective agencies * * * the reference to the Commission and to the Act was to show the choice of a circuit court of appeals for judicial review and was not intended to suggest the adoption for the Tax Court review of any standard of scope of review embodied in either Act."

This is a recent recognition by this Court of the Petitioner's contention that orders of the Federal Trade Commission were not intended to have the finality in matters of remedy which might be accorded in the case of the Tax Court. There is similar sound Congressional reason for this position with respect to the Federal Trade Commission because after the Royal Milling Company case, in which this Court did modify a remedy prescribed by the Commission, the Federal Trade Commission Act was amended without any further limitation of the jurisdiction of the courts on appeal.

Petitioner believes that there is a stronger purpose to be served in labor relations cases, as well as different statutory provisions prescribing the review of the two types of administrative cases.

To begin with, labor relation cases often require supervision. In other words, an employer is required by order to recognize or deal with a particular Union, or not to recognize or deal with it, in his daily contact with his employees. Questions of administration of the orders constantly come up. There are sometimes elections to be held and supervised by the Board. Seldom will a mere cease and desist order suffice. Therefore, in labor cases

this Court has been reluctant to interfere with the methods adopted by the Board. Presumably, it would do so if those orders violated some provision of the Constitution, or perhaps some provision of a statute.

Suppose, for instance, the Labor Relations Board should order the president of a corporation employer or the leader of an insurgent Union, shot at sunrise. No jury trial having been held, nor indictment found, it is hard to believe this Court would not say such an order was invalid, notwithstanding the Board's opinion as to the necessity for such action to accomplish labor representation in that industry.

This Court, doubtless, would say that the order was invalid because it bore no true relation to the object to be accomplished. It might say the order directed a desirable result, but was invalid because prohibited by Constitutional restriction.

The Petitioner believes this case is such a type. The object to be accomplished is the prevention of public deception or misbranding. The Act itself sets forth the policy as follows:

Act of September 26, 1914, c. 311, Sec. 5 38 Stat. 719; 15 U. S. C. A. 45, as amended.

"The Commission is hereby empowered and directed to prevent persons * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."

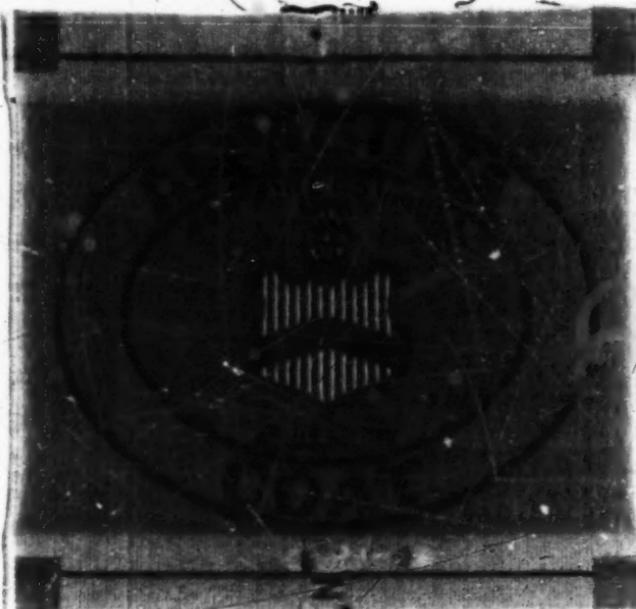
There seems to be no doubt that the use of the word "Alpacuna" upon a garment made of animal fibres is not a wrong in and of itself. The complaint of the Commission goes no further than to say that the use of the word on a garment containing alpaca, but not vicuna, is wrong because tending to be deceptive. The alleged deception is considered to lie in the connotation supposed to

reside in the word "Alpacuna"—that the garment contains vicuna fibres. Vicuna fibre is present only in minute proportions, and quite unintentionally.

Petitioner believes that the word "Alpacuna" is not an evil word, *per se*. Such deception as the Commission charges arises only by inference. No one ever was deceived. The only evidence to support the charge of deception is testimony by **experts** that they might be deceived, but weren't.

Thus, it is factually clear in this case that the only wrong to be cured is the supposed representation that vicuna fibre is present, when, in fact, it is not. Petitioner believes a direct statement on the label and immediately under Alpacuna "contains no vicuna" in conspicuous type would effectively negative any import the mark might carry to the contrary.

Since the opinion of the Circuit Court of Appeals was handed down November 30, 1944, Petitioner has devised and is using new labels showing the name prominently modified: "Alpacuna, contains no vicuna." Samples of these labels are as follows:



ALPACUNA OVERCOAT

REG. U.S. PAT. OFF.

CONTAINS NO VICUNA**CONTENTS:**FACE: 60% ALPACA & MOHAIR
40% VIRGIN WOOL

BACK: 100% LONGSTAPLE COTTON

FACE CONSTITUTES 68% OF
FABRIC AND BACK 32%**DISTRIBUTED BY**

MFR. No. 278

ALPACUNA TOPCOAT

REG. U.S. PAT. OFF.

CONTAINS NO VICUNA

MFR. No. 278

CONTENTS: 60% ALPACA & MOHAIR

40% VIRGIN WOOL

DISTRIBUTED BY

The statement of fibre content is now required by the Wool Products Labeling Act; 54 Stat. 1128; 15 U. S. C. A. sec. 68.

The destruction of the mark goes beyond any necessary restriction. Destruction of the mark will, of course, be completely effective;—the liquidation of the Jacob Siegel Company would also be effective. Petitioner believes that any administrative remedy not reasonably limited to the object directed to be achieved by statute is a destruction of property and unconstitutional.

The Petitioner, therefore, respectfully reiterates that it believes this Court and the Circuit Court of Appeals have authority to limit the remedy to what is fairly related to the object to be accomplished, and if need be, to modify the administrative order. The Royal Milling case so holds.

Petitioner believes that even if the use of the word "Alpacuna" is deceptive, the use of the words, "Alpacuna, contains no vicuna" is not deceptive. It may be that in choosing a new mark or trade name today, the choice of such a slogan would be unwise. However, in view of the fact that "Alpacuna" has been used for fourteen years, with no evidence of deception, the use

of the phrase "Alpacuna, contains no vicuna" could be objectionable only on the ground that it might set a bad example for others. In this way it might be stated to "tend to lead" to deception by others. But the jurisdiction of the Commission does not extend so far as to enjoin such practices, which in themselves, are inoffensive merely on the ground that they may set a bad example for others. Under the Federal Trade Commission Act, the practice must be an unfair or deceptive act in commerce. Petitioner, therefore, believes that the Commission has gone beyond its power in ordering the obliteration of a trade name merely because it believes that the practice of the past, if continued into the future, might become deceptive.

Apparently recognizing the difference, the Circuit Court of Appeals for the Ninth Circuit quite recently did modify the remedy applied by the Federal Trade Commission in a cease and desist order.

**Ultra-Violet Products, Inc. v. Federal Trade Commission, 143 Fed. (2d) 814 (1944)—C. C. A. 9.
(Decided June 30, 1944.)**

Here the question was about the extent to which the advertising of a ray lamp correctly represented its therapeutic powers. The Commission ordered the cessation of seven types of advertising. The court refused to enforce two of the orders, affirmed four, and modified one. As to the latter, the court states (p. 817):

"Regarding the prohibition against advertising that the lamp 'normalizes the chemistry of the body, improves metabolism, or builds new tissues, except insofar as its use **may** result in the production of vitamin D,' we agree that it should be modified as requested by the petitioner to read to prohibit the statement that the lamp 'normalizes the chemistry of the body, improves metabolism, or builds new

tissues, except insofar as such effects are related to the production of vitamin D resulting from the use of the lamp.''" (Emphasis supplied.)

Thus, the Court restricted the order to what was necessary to prevent untrue statements.

In the case of

**Parke, Austin & Lipscomb v. Federal Trade Commission, 142 Fed. (2d) 437 (1944)—C. C. A. 2.
(Decided April 19, 1944.)**

Judge Chase states, as quoted in the opinion of the Circuit Court of Appeals in the present case (R. 901) at page 441:

"The petitioners are standing upon much firmer ground when they insist that this paragraph in the order is needlessly severe in its sweeping requirement that the words 'Smithsonian Institution' must be eliminated from the corporate name of petitioner Smithsonian Institution Series, Inc. There may well be some alternative remedy less drastic but adequately effective which might satisfy the requirements of fairness and should be adopted. On this record, however, we cannot be sure that the Commission has abused its discretion in this respect, and only in that event should we interfere with its action."

The indication is that the court would have modified the order in case of an abuse of discretion. The Circuit Court of Appeals in the case at bar concludes its opinion as follows (R. 902):

"That discretion has been exercised to totally prohibit the use of the name 'Alpacuna' to the petitioner. Since the Commission has such power, we are unable, in view of the evidence, to say that the power has been abused in this instance, though under

the same facts and circumstances, if we were still in control of the remedy, we would modify the order as above indicated."

Petitioner submits that it is an abuse of discretion to destroy an established trade name made valuable by many years of advertising where the addition of the words "contains no vicuna" will serve effectively to prevent the deception the Commission fears may, but as yet has not occurred.

The only issue of fact before the Commission was whether "Alpacuna" was deceptive. There was no question about whether "Alpacuna Contains no Vicuna" is deceptive. There is no evidence on this point. In the Ultra-Violet case, there was evidence that the advertising was partly true. The Circuit Court of Appeals refused to permit a blanket cease and desist order. So did this Court recently in the May case with a Labor Board order. So here, this Court may regard the question of the modified name as not supported by any evidence. If the Court takes that position, the cease and desist order should be modified to conform to the evidence.

Thus, this Court may either regard the Order as unreasonable and an abuse of discretion, or it may fairly regard it as wholly unsupported by evidence so far as designed to prevent the use of "Alpacuna, Contains no Vicuna."

The Federal Trade Commission Act expressly provides that the appellate court "shall have power to make and enter, upon the pleading, evidence, and proceedings set forth in such transcript a decree affirming, modifying or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed . . ." (Emphasis added.)

52 Stat. 111; 15 U. S. C. A. Sec. 45 (c), and (d).

There seems to be no general idea among the Circuit Courts of Appeal that the decisions of this Court in Labor

Board cases restrict the right of the Court to modify an order of the Federal Trade Commission. As stated in the Circuit Court of Appeals' opinion in this case, the Circuit Court of Appeals for the Second Circuit at first conceived it had this right, and now feels that it does not have the right to modify an order of the Federal Trade Commission. But even that court states in the Parke case that it would do so in case of an abuse of discretion. One of the earlier Second Circuit cases is

Establishments Rigaud, Inc. v. Federal Trade Commission, 125 Fed. (2d) 590 (1942) (C. C. A. 2).

It appeared that a group of persons, most of whom were French, and lived in France, imported to this country ingredients from which they mixed perfumes in New York. They sold these perfumes under labels indicating the perfumes were imported. A cease and desist order issued which, among other things, prohibited the use of French words on the label. On petition for review, the court stated as follows (page 591):

"We think the order is too broad. The proceeding against Rigaud and Fougera was calculated to correct abuses which at best were trifling and but for the broad discretion lodged in the Commission we should regard as hardly worth serious consideration. It must, however, be remembered that the ingredients of the perfumes were mainly French and that the business to a great extent has been supervised by French directors and stockholders. It is notorious that French names are commonly used to describe perfumes and for some reason seem to be favorites with the trade. It is doubtless permissible to forbid the use of words which indicate a French origin and manufacture when *strictissimi juris* there is none, but we can see no reason for proscribing the use of all French words when designating the perfumes or for the rather fantastic requirement of the order that the

price of retention must be an accompanying English translation. It is enough to insist upon the abandonment of the words 'Paris' or 'Paris, France' unless they are limited as in clause 1 of the order. We think the most the Commission should require is that Rigaud and Fougera cease and desist from the acts embraced in clauses 1 and 3. *Fioret Sales Co. Inc. v. Federal Trade Comm.* 2 Cir., 100 F. 2d 358.

"The order should be modified by the elimination of clause 2. As thus modified, the order is confirmed and enforcement thereof is granted."

Such of the other Circuit Courts as have had occasion to modify an order of the Federal Trade Commission, have done so without any restraint.

**Federal Trade Commission v. Mid West Mills, Inc.,
90 Fed. (2d) 723 (1937)—C. C. A. 7.**

In this case, the Commission entered an Order directing the respondent to cease the use of its corporate name "Mid West Mills, Inc." on the ground that its use was likely to make purchasers of woven goods think they were buying from a manufacturer rather than from a jobber. The Circuit Court of Appeals for the Seventh Circuit felt that the name did not need to be destroyed, but could be rendered harmless by the addition of explanatory words.

At page 725, the court states:

"We are convinced that respondent may avoid any false impressions and implications arising from the use of the word 'Mills' if it uses on all of its stationery, garment labels, tickets, invoices, and other printed matter, these words 'Jobbers and Converters, Not Mill Owners or Mill Operators.' There would then be no possibility of deception. Of course, these are not the only words which might be adopted. The

Commission must in the first instance determine whether the words sufficiently convey the information that respondent neither owns nor operates a mill."

The Commission is now taking the position that qualifying words are not appropriate here because it is impossible to qualify a contradiction. The idea seems to be that anyone who from now on reads the terms "Alpacuna Contains no Vicuna" will first imply from the word "Alpacuna" that it contains Vicuna, and will then be confronted with the words "Contains no Vicuna." Thereupon, he will note the contradiction and will not be sure. Since no one is shown to have been misled by fourteen years' use of the unmodified mark, it is hard to believe the explanation would increase confusion. Petitioner is convinced that its request is reasonable. The court in the above case felt that it was proper for the Petitioner to use the word "Mills" in its name notwithstanding it was not a mill, provided it stated thereon these words:

"Jobbers and Converters, Not Mill Owners or
Mill Operators."

The same was true in the Royal Milling case, and another case to the same effect is as follows:

**Federal Trade Commission v. Hires Turner Glass
Co., 81 Fed. (2d) 362 (1935)—C. C. A. 3.**

In this case, the respondent was in the habit of advertising its mirrors as "copper-backed." It appeared that these words had come to indicate to the trade mirrors backed by a sheet of copper electrolytically applied. The respondent applied its so-called copper back by painting thereon a mixture of shellac and powdered copper. The advertising was, therefore, regarded as deceptive. The Commission directed the respondent to stop using the term "copper-backed." The Circuit Court of Appeals

for the Third Circuit affirmed the order. At page 364, Judge Thompson states:

"It may well be that, had this court been a fact-finding tribunal, it might have reached conclusions other than those reached by the petitioner. The petitioner, however, had before it ample evidence upon which to find that the terminology had acquired a secondary meaning, prior to its use by the respondent, and that the respondent's mirrors did not contain the essentials of genuine copper-back mirrors. Inasmuch as it is the duty of the Commission to determine the facts, it is our duty to sustain the Commission if there is any substantial evidence upon which its findings are based."

Thereafter, a petition for modification was filed, and the Commission's order was modified. At page 364, Judge Thompson states further:

"The Commission's cease and desist order is accordingly modified by adding thereto the following: 'Provided, however, that the respondent may use such designations as are accompanied by qualifying terms which clearly signify that the copper backing on its mirrors is not electrolytically applied'."

The court below thus in 1935 felt that it had the right to modify a destructive order of the Commission.

Dietzgen Co. v. Federal Trade Commission, 142 Fed. (2d) 321 (1944)—C. C. A. 7. (Decided May 3, 1944.)

In this case an order of the Federal Trade Commission against certain price fixing practices was approved by the court upon petition for review. The report of the case indicates that the opinion of the court was filed February 29, 1944. The reporter then states: "As Modified on Denial of Rehearing May 3, 1944."

The closing paragraph of the court's opinion reads as follows (page 332):

"The order of the Commission is approved. Counsel for respondent will draw a proposed order and submit it to petitioners, pursuant to the rule of this court respecting the drafting of orders in cases where appeal is taken from a ruling of an Administrative Board. In such order, respondent is directed to modify its order and make it clear that the cease and desist order enjoins petitioners from doing any of the acts or things condemned *pursuant* to any agreement, combination or conspiracy here found to exist."

Even the Circuit Court for the Second Circuit has recently modified an order of the Federal Trade Commission, notwithstanding its previous announcement in the Herzfeld case (140 Fed. 2d 207) (cited by the court below in its opinion R. 899) that it had no authority to do so.

Gelb v. Federal Trade Commission, 144 Fed. (2d) 580 (1944)—C. C. A. 2. (Decided August 14, 1944.)

The complaint of the Commission in this case had to do with advertising a preparation for shampooing and coloring the hair. A cease and desist order was issued, paragraph 2 of which reads as follows:

"(2) Representing that said preparations recondition the hair, or restore the natural or youthful color of the hair."

In affirming the Order, the Circuit Court of Appeals for the Second Circuit stated in part as follows (p. 583):

"Clause (2) of the order is modified by omitting the words 'recondition the hair or'; as so modified the order is affirmed."

This action is doubtless not to be considered in conflict with the position previously taken by the same court, that it had no power to modify the orders of the Commission. It probably based its modification of the order in this case on the claim that the evidence did not support the Commission's finding that the preparation would not "recondition the hair." While it is possible to explain the case upon the theory that there was no evidence to support the finding, nevertheless it is worthy of note that the court did modify the order of the Commission. In the case at bar, it may also be noted that there is no evidence that the addition of the words "Contains no Vicuna" will be ineffective here. If there is no such evidence, there likewise is no basis for abruptly ordering the respondent to cease and desist altogether from using the word "Alpacuna."

Lekas & Drivas v. Federal Trade Commission, 145 Fed. (2d) 976 (1944)—C. C. A. 2. (Decided November 30, 1944.)

In this case the Commission attacked certain advertising relative to olive oil which was stated to have some slight value as a laxative. The Commission ordered such advertisement to stop. An expert witness had stated that the value of olive oil as a laxative was "Slight, if any." This, the Circuit Court of Appeals for the Second Circuit, held was not sufficient to support the order which wholly enjoined advertising on that subject. At page 976, the court states:

"For this reason we think that the order: Article I (a), should be supplemented by this suffix: 'except a possible slight value as a laxative.'

"Order modified as above indicated, and, as modified, affirmed."

There was sound reason for the Circuit Court of Appeals to consider the remedy in this case unnecessarily

harsh. The trade name "Alpacuna" has now been used for considerably more than fourteen years. It was invented by the Petitioner as a fanciful name for a new kind of overcoat. This trade name has been advertised by stores all over the United States, as well as by the Petitioner. The local franchise for Alpacuna coats is sought after, and is valuable. The combined efforts of all these people has made the Alpacuna coat the largest selling overcoat in the United States. The good-will attached to this name is valuable. No one has ever been deceived by it. Very few people have ever heard of a "Vicuna" which the Commission says is suggested by the name.

This proceeding was brought by the Federal Trade Commission to compel a change in the method of advertising garments made of wool or other animal fibres. The Alpacuna coat comes in two weights, light and heavy. The heavy coat has a cotton back on which the woolen face is built. The Commission felt that the fibre content was not properly represented in the advertising. The face of the coat is 40 per cent virgin wool, and 60 per cent alpaca and mohair. The Petitioner readily agreed to state frankly the fibre content of the coat. Doing so was considered an advantage, and there was never any intention at concealment. The Commission's order requiring proper representation as to fibre content is, therefore, not opposed.

The Wool Products Labelling Act now requires by statute that all fibre garments be properly marked to indicate the fibre content. Since all manufacturers are now prohibited from marking something as wool which is not entirely virgin wool, the equality of treatment thus afforded is eminently fair.

As may be imagined, a trade name as widely known and well established as "Alpacuna" has many imitators. If the Court could examine the advertising in any large city, when the spring or fall sales' campaigns are in

progress, many names would be noted which are obviously designed to approximate the name "Alpacuna." Samples of some of these will be presented to the Court. The evidence in this case shows that there are large numbers of such names. At R. 305a and 639a-640a, sixty-two are listed.

The effect of complete destruction of the primary trade name "Alpacuna" is certain to render more valuable myriads of imitations. The Commission has no campaign in prospect to endeavor to stop the other similar names. Thus, the leader in the trade who invented this type of cloth and established public acceptance for it is to be penalized by having its trade name destroyed and its competitors enthroned in a primary position. The order of the Commission is not limited to interstate sales. Complete destruction of the trade name is demanded. This enforced abandonment of a trade name throws it open to successful imitation by any one else. Near approximations have already been adopted by many, and these are not the object of any attack by the Commission.

It is respectfully submitted that no decision of this Court requires a Circuit Court of Appeals to affirm an order like this which it believes to be wrong. This Court has, itself, directed modification of remedy prescribed by numerous commissions or administrative agencies, even the National Labor Relations Board. It is, therefore, submitted that there is not and should not be any firm rule which completely prohibits modification of a remedy prescribed by the Federal Trade Commission. A reference back to the Circuit Court of Appeals for the Third Circuit with a mandate to consider the propriety of the prescribed remedy is all that Petitioner seeks. The right to modify an unsatisfactory remedial decree has been recently affirmed by this Court in the May case. It may be that such modification is to be sparingly applied, but the Circuit Court of Appeals for the Third Circuit has clearly indicated its dissatisfaction with this order and its belief

that the order transgresses the power of the Commission because it is too sweeping. That Court has also shown its belief that the order should be modified if the court has power to do so.

Respectfully submitted,

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